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Utah Supreme Court

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Gregory B. Wall; Wall and Wall; Attorneys for Appellant.
S. Rex Lewis; Attorneys for Repsondents.

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IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation, Plaintiff-Appellant v. GLENN J. BETHERS and TELLA MAE BETHERS, husband and wife, Defendants-Respondents	BRIEF OF APPELLANT Case No. 860311 860212-CA

APPELLANT'S BRIEF

APPEAL FROM AN ORDER OF DISMISSAL OF THE FOURTH DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation, Plaintiff-Appellant v. GLENN J. BETHERS and TELLA MAE BETHERS, husband and wife, Defendants-Respondents	BRIEF OF APPELLANT Case No. 860311

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AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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PRELIMINARY STATEMENT

R. refers to the record on appeal, Tr. refers to the Transcript of Trial, with the page numbers referring to the pages as they are numbered by the court reporter, and Ex. refers to exhibit.

ISSUES PRESENTED FOR REVIEW

1. Were the defendants-respondents paid the full purchase price for the subject property at the time it was sold by the developer of the subject subdivision?

2. If the defendants were in fact paid the purchase price when the subject residential lot was sold by the developer, is the plaintiff now entitled to have refunded to it, by means of a judgment against defendants, the amount of the purchase price for the same lot paid a second time, which second payment was made by the plaintiff?

STATEMENT OF THE CASE

(A) Nature of the Case:

This is an appeal from an Order of Dismissal with Prejudice (R. 194) dismissing the plaintiff's action against the defendants,

granted by the honorable George E. Ballif, district judge, in the Fourth District Court in and for Utah County, State of Utah.

(B) Statement of Facts:

The plaintiff is a Texas corporation and has obtained a certificate of authority from the State of Utah, and is thus authorized and permitted to maintain this action pursuant to the provisionsof 16-10-120, U.C.A., 1953, as amended. (R. 174) The plaintiff is further authorized by the State of Utah, by and through its insurance commissioner, to issue policies of title insurance, and to generally engage in the business of title insurance in the State of Utah. (R. 175)

The defendants are individuals, and residents of Utah County, State of Utah. (R. 175)

On or about June 7, 1978, the defendants, together with Welby and Ellen Bethers, entered into a written agreement (Ex. 16) with Sunwest II Development Corporation (the developer of the overall parcel of land) wherein it was agreed that Sunwest would purchase from Bethers the tract of land more fully described in the overall Trust Deed (Ex. 1), subject to the terms of said Agreement. (R. 175) On the same date the parties to the subject Agreement, plus T. Michael Crockett and Harold M. Paulos, officers of Sunwest, as individuals, signed a Trust Deed which included and affected the subject property. (R. 175) Said Trust Deed was given as security for a Trust Deed Note (Ex. 2), dated June 7, 1978, for the principal amount of $82,950.00. (R. 175)

On that same date the defendants had conveyed by Warranty Deed the subject property to Sunwest. (R. 86)

Part of the said Agreement between Bethers and Sunwest provided that Bethers would reconvey title to one lot in the subdivision that was to be developed by Sunwest for each $6,912.50 principal reduction paid towards the subject promissory note. (R. 175)

The lot in the subidivision which is the subject of this action is Lot one. After the subdivision was developed Lot 1 was sold by Sunwest to an individual by the name of Norman Anderson. (R. 175; R. 88) Norman Anderson then sold the subject lot to Tony Max Martin and Dale Martin. (R. 175: R. 89) At the time of this sale the plaintiff, Southern Title, as underwriter for its local agent, issued a mortgagee's policy to Trans-America Mortgage Company. (R. 175) As a result of a foreclosure action by Trans-America against the Martins, Trans-America acquired the interest of Martins' in Lot 1. (R. 93) It was then learned that no reconveyance of Lot 1 had ever been obtained and recorded at the time Norman Anderson bought the lot from Sunwest, and Trans-America therefore made demand, under its title policy (R. 5), that Southern Title clear the defect in the title.

In order to protect its insured, Southern Title proceeded to determine if the payoff for Lot 1 was in fact still owing.

Among the steps taken by plaintiff to accomplish this task, counsel for plaintiff mailed a letter to Valley Title Company on October 5, 1984 (Ex. 7), Valley Title Company being the entity in charge of handling the reconveyancing of lots in the subject subdivision, together with other functions, on behalf of Mr. Bethers. (Tr. 16) As can be seen from the said Exhibit 7, inquiry was being made to determine if the subject lot had ever been paid for. (Tr. 26) On October 10, 1984, Valley Title Company responded by letter to plaintiff's counsel advising him that Lot 1 had apparently never been paid for, that the balance was still owing for that lot, and other details involving the sujbect were also discussed. (Ex. 8) (Tr. 26) Acting on the information in the letter from Valley Title (Ex. 8) the plaintiff elected to pay the amount owing and obtain the necessary reconveyance. (Ex. 9; Tr. 29; R. 176) A check for the amount of $9,582.60 was mailed to Valley Title for the benefit of the defendants, those funds were received by the defendants, and the reconveyance for Lot 1 was delivered to plaintiff and recorded. (R. 176; Tr. 29) However, plaintiff's counsel having obtained additional information subsequent to the date of the delivery of the check and the reconveyance, which information is more fully discussed and described below, made a claim upon the defendants for the return of the money paid, believing that Lot 1 had been paid for at the time of the original sale to Norman Anderson, and that as a result, the second payment by plaintiff constituted a double payment for the lot. This claim was made

by plaintiff on the basis that it was subrogated to the rights of Trans-America Mortgage Company pursuant to the terms of its insurance policy. (R. 176) This action then ensued. The facts to this point are essentially undisputed, excepting only the primary issue as to whether or not there had been a double payment for Lot 1, as believed by the plaintiff.

Essential to the understanding of the facts of this case, particularly to the disputed facts, is a knowledge of the arrangement established by Bethers and Sunwest for the release of lots in the subject subdivision. At the outset of the relationship between Sunwest and Bethers, the Bethers had executed and delivered to Valley Title Company a number of Request for Reconveyance forms, one for each lot in the subdivision. (Tr. 10) When a particular lot was sold a certificate of deposit for the amount due the Bethers was deposited with Valley Title Company in exchange for a partial reconveyance of the lot being sold, using one of the previously executed forms. (Tr. 16, 31; Ex. 6) When the certificate matured it was then returned to either Sunwest or Mr. Bethers, who then cashed it and had a check issued to Mr. Bethers for the amount due. (Tr. 16, 66) This was all pursuant to the Agreement between the parties. (Ex. 16) When the certificate of deposit matured, it was often the practice of Sunwest to take in another check to pay off Mr. Bethers and retrieve the Certificate of Deposit and deposit the money back into Sunwest's account after the certificate was redeemed. (Tr. 66) On other occasions, it was the practice to retrieve the Certificate of

Deposit, redeem it, and then pay the money to Mr. Bethers. (Tr. 38-40; Ex. 10) From the evidence to be described more fully below, it would appear that this latter procedure was the one used with Lot 1.

On or about January 30, 1981, a check from Valley Title Company in the amount of $9,267.50 (Ex. 3) was made out to Sunwest and delivered to them, said check being a payoff to Sunwest of monies due from the closing of the sale of Lot 1 to Norman Anderson. (Tr. 62, 16) That document or exhibit indicates that it was exchanged for a "CD", and that it constituted a payoff on Lot 1. (Ex. 3) The testimony from one of the officers of Sunwest indicated that they had been paid for Lot 1, that they had purchased a Thrift Certificate for Lot 1, and that that Thrift Certificate had been deposited with Valley Title. (Tr. 63) This testimony substantitates and conforms to the notation on Exhibit 3. The funds for the check to Sunwest were derived from monies paid to Valley Title Company by Reid National Title, the company apparently handling the closing. (Ex. 4; Tr. 19)

During the course of the dealings with the parties, Valley Title Company kept a large manila envelope in its office that contained the Certificates of Deposit, or Thrift Certificates, as the case may be, (Tr. 20), and upon which manila envelope the appropriate dates that each certificate was received were noted, together with the dates they were released and the lots

to which they applied. (Tr. 20) The information recorded on this evelope cover was recorded over a period of approximately two years, 1979 through 1981, by various persons employed by Valley Title. (Tr.20) (Ex. 5) Based upon the testimony of Mr. Hall from Valley Title Company, Exhibit 5 accurately shows the record of CD's and Thrift Certificates that were received by Valley Title Company and deposited into the evelope. (Tr. 21) The court will note that in the second column of figures on Exhibit 5, third item from the bottom, there is an entry reading "Lot 1 1-30-81." Based upon the records kept this indicated that a Certificate of Deposit was received by Valley Title Company for Lot 1 on January 30, 1981. (Tr. 34) It was the deposit of these Certificates of Deposit, or Thrift Certificates, as the case may be, that triggered the reconveyance of a particular lot, and not the payment of the monies, per se, to Mr. Bethers. (Tr. 33)

The evidence also indicated that it was the practice of Valley Title Company to make a small notation on the Thrift Certificates of the lot for which the certificate was being deposited with Valley Title Company. (Tr. 62) The certificate in question, which will be mentioned below, bears a notation in the lower, left-hand corner stating: "Lot 1."

Also introduced and received into evidence was a 5x8 slip of paper (Ex. 12) which was found in the same manila folder described and mentioned above. (Tr. 44) This exhibit is an accounting of monies owed to Mr. Bethers, and reflects receipts for Lot 1.

On or about January 30, 1981, an FMA Thrift & Loan Company Thrift Certificate, number 49945017, in the name of Sunwest II Development Corp., was purchase, in the amount of $8,900.00. The same amount shown as received by Valley Title Company on Exhibit 12. (Ex. 13; Tr. 48) This certificate bears a notation in the lower, left-hand corner of "Lot 1."

When this certificate was redeemed, a Cashier's Check from FMA Thrift & Laon Company, (Ex. 14), was made out, payable to Glenn Bethers, one of the defendants, in the amount of $9,563.38. (Tr. 49) Exhibit 13, the Thrift Certificate, is endorsed on the back by Sunwest. (Tr. 50) When the certificate was redeemed by Sunwest,Sunwest would have to have authorized to which party the check was to be payable. (Tr. 51) Attached to the original Cashier's check (Ex. 14), was a stub (Ex. 15) indicating that the check was paid as a result of the redemption of certificate 49945017 which is Exhibit 13, with Sunwest as the named party on that certificate. (Tr. 52) This voucher portion of the check would have accompanied the original check. (Tr. 54) Exhibit 14 is endorsed on the back by the name Glenn J. Bethers. The defendant has acknowledged receiving a payment on the subject note on August 14, 1981, in the amount of $9,563.38. (R. 115, 118) The court also, as a part of its findings of fact, found that said check had been received by the defendants. (R. 192) These records and documents are the full extent of the records kept. Mr. Bethers kept no record of what lots were being paid off, nor any record of what lot a particular payment was being made. (Tr. 12)

SUMMARY OF ARGUMENTS

1. The defendants have been paid twice for the same lot, i.e., Lot 1. Lot one was sold to Norman Anderson, monies collected, and a check from Valley Title given to Sunwest, the developer. Sunwest delivered a thrift certificate to Valley Title, where notations on an envelope and the corner of the certificate indicated it was for lot 1. That same certificate was later redeemed and a check issued to Glenn Bethers, which he admits having received. Thus, the application of the thrift certificate to a particular lot has been established, and the chain of payment of the monies to the defendants has likewise been established. Therefore, the payment from plaintiff to Bethers constituted a second payment for the same lot.

2. The plaintiff negotiated with the defendants, through its attorney, under the belief, and the representation by both the defendants and the title company handling the matters involved, that Lot 1 had not been paid for at the time it was sold by Sunwest to Norman Anderson. The payment by plaintiff was made to protect the interest of its insured, with the threat of foreclosure existing as a real possibility at the time the payment was made.

3. The plaintiff received nothing for the payment it made to the defendants because the issuance of the reconveyance by defendants was only the performance of an act they were already obligated to do by virtue of the payment received in 1981.

4. The defendants' contention in the district court below that the fact that the final payment on the trust deed note had not been paid in time, and thus they were excused from performing in any event, is without merit. No evidence indicated that a demand had been made upon the note, nor that any type of foreclosure proceeding has ever been instituted, and the fact that defendants reconveyed in 1984 to the successor in interest upon receipt of the money from plaintiff for Lot 1 only, all constitute a waiver of defendants' right to excuse their performance due to a lack of payment in full of the entire balance due under the note.

ARGUMENT

POINT I:

THE DEFENDANTS HAVE BEEN UNJUSTLY ENRICHED AT THE EXPENSE OF THE PLAINTIFF, AND PLAINTIFF IS ENTITLED TO A RETURN OF ITS MONIES PAID TO DEFENDANTS

It is generally stated that ". . . an action to recover money voluntarily paid will lie only where equity and good conscience require the return of the money, and a prerequisite for recovery of a payment on the ground of unjust enrichment is that the person sued must actually be unjustly enriched." 70 C.J.S. Payment, Sec. 133, p. 343. It is also generally stated that " . . . no action may be maintained to recover an overpayment made to a vendor by the purchaser under a contract for the sale and purchase of real estate, unless it was made by mistake, or by reason of fraud or duress on the part of the vendor." 92 C.J.S. 553, p. 564. It is our opinion in this action that the Bethers

have received a payment from the plaintiff for the purpose of reconveying title to Lot 1 of the subject subdivision, which payment was mistakenly made upon the assurance by defendants and the title company involved, Valley Title, that the defendants had never been paid for Lot 1. The mistake lies in the fact that the evidence now would seem to clearly indicate that the Bethers had been paid for Lot 1 back in 1981 at the time it was sold by the developer to Norman Anderson. The uncontroverted facts concerning the sale of Lot 1 can be summarized as follows:

1. Lot 1 was sold to Norman Anderson by Sunwest Development (R. 88), and a check for monies due Sunwest from the closing was given to Sunwest by Valley Title. (Ex. 3) At this point alone, it is highly improbable that Sunwest would have conveyed title by Warranty Deed to Norman Anderson without completing the standard and necessary steps to see that title to the property was reconveyed per the agreement between Sunwest and Bethers. Furthermore, it is highly unlikely that Valley Title Company would have made a notation on Exhibit 3 to the effect that the check had been exchanged for a CD if that, in fact, had not occurred.

2. Valley Title Company, the agent for defendants, received from the closing agent, apparently Reid National Title, monies that would enable them to deliver the check (Ex. 3) to Sunwest. The receipt from Valley Title, receipting these funds, (Ex. 4), also indicates that it was for Lot 1.

3. On the manila envelope maintained by Valley Title for the storage and keeping of the certificates of deposit, (Ex. 5),

there is a notation that a certificate for Lot 1 had been received, which evidence comports with the statement on the voucher portion of Exhibit 3, and the notation on Exhibit 4.

Of interest on this point is the testimony by Mark Hall, the officer of Valley Title Company. In his testimony at the trial he stated the following, in describing Exhibit 5: [See Tr. 20]

"Q. (By Mr. Wall) Now, Mr. Hall, let me show you what has been marked as Plaintiff's Exhibit No. 5. Can you identify that item?

A. Yes. This is a xerox of a copy of a manila envelope that Valley Title maintained in our office that contained the Certificates of Deposit that were given to us by Sunwest II, with the appropriate dates that the Certificates of Deposit were received and the dates they were released, and the lots that they applied to.

The handwriting was done by a number of individuals over a period of approximately two years, 1979 through 1981. [Skipping to line 25, Tr. 20]

"Q.And the various lots that are listed, based upon your knowledge, does this indicate that a Thrift Certificate or a CD was received for that particular lot?

A.I believe it does. I did not keep these records, and there is a date and a notation by Lot 1. But it does not show that that Certificate was released, and there is not a Certificate of Deposit in that file for Lot 1.

Q. But based upon your knowledge of the bookkeeping procedures

and the recordkeeping procedures of Valley Title, this would be a record of CD's and Thrift Certificates that were received by Valley Title and deposited into this manila envelope?

A. That's correct."

4. Sunwest purchased the necessary thrift certificate and delivered it to Valley Title, based upon testimony of Sunwest. Mr. Harold Paulos, an officer of Sunwest, testified that not only were funds received from the sale of Lot 1 to Norman Anderson, but that a CD was purchased and delivered to Valley Title in exchange for the check. (Tr. 65) He testified that that particular CD was for Lot 1. (Tr. 65)

5. Exhibit 12 indicates that Valley Title Company received $8,900.00 for Lot 1, with other notations and figures being set forth on the same exhibit. (Ex. 12) This slip of paper was kept in the same manila envelope, i.e. Exhibit 5, along with the CD's and thrift certificates left with Valley. (Tr. 44)

6. Exhibit 13 is a Thrift Certificate which:

a. Bears a pencil notation in the lower, left-hand corner that would seem to indicate it is for Lot 1.

b. Bears a date (January 30, 1981) which is identical to the date on the check (Ex. 3), the receipt (Ex. 4), and the notation on the manila envelope. (Ex. 5).

c. The amount of the certificate is the same amount set forth on Exhibit 12, which Valley Title Company seemingly indicated that it had received for Lot 1.

7. This same thrift certificate (Ex. 13) was later redeemed for a cashier's check in the amount of $9,563.38 (Ex. 14), made payable to Glenn Bethers, and which check and monies he has admitted receiving, and which finding is supported by the court's own findings. Testimony by Michael Winder from Continental Bank, the successor in interest to the FMA records and accounts, together with the information on the voucher on Exhibit 15, all indicated that this check was issued from the funds derived form the redemption of Exhibit 13. (Tr. 49)

It is the position of the plaintiff that in order to show that the Bethers have already been paid for Lot 1, plaintiff must show two things. First, that a certificate of deposit was given to Valley Title for Lot 1 per the terms of the agreement between the parties. Second, that that same certificate was redeemed and the funds delivered to the Bethers. We submit that plaintiff has clearly proven these two points. The various exhibits mentioned above all show that apparently a CD or thrift certificate was received by Valley Title for Lot 1. This fact alone should have been enough for the reconveyance to have issued. Keep in mind that under the terms of the agreement this was all that was required for the actual reconveyance, which, for reasons that are unknown, did not occur in this instance. It should also be kept in mind that absolutely no evidence to the contrary was introduced nor received by the court. Any and all evidence bearing on this point indicated to one degree or another that a CD had been left with Valley Title for the purpose of having Lot 1 reconveyed.

The evidence before the court also indicated that Exhibit 13 was that same certificate. And, it was that certificate that was redeemed and the funds used to pay the Bethers. Given these facts alone it is clear that in 1981 the Bethers were paid for Lot 1. This is all the more persuasive when one considers that no evidence to the contrary was received by the court.

Thus, if the Bethers had been paid for Lot 1 in 1981, as the plaintiff contends, the payment for Lot 1's release in 1984 by the plaintiff, in its subrogated position, did nothing more than pay the Bethers a second time for a lot for which they had already been paid. Plaintiff, therefore received nothing in exchange. The defendants thus having been paid twice for the same lot are obligated, as a matter of equity, to refund to the plaintiff the monies mistakenly paid by it. If Valley Title, or Mr. Bethers, have made a mistake in accounting for funds received, or have failed to credit payments where appropriate, that has no bearing on the plaintiff's position. Plaintiff need not show where the funds were improperly credited, or where the mistake might lie, although that would be helpful. All plaintiff needs to do to prevail is to show that the Bethers have been paid twice for the same lot.

POINT II

THE PLAINTIFF HAS NOT RECEIVED WHAT IT BARGAINED FOR FROM THE DEFENDANTS

It has repeatedly been the contention of the defendants that the plaintiff received what it bargained for by paying the $9,563.38 to the defendants in exchange for the reconveyance of Lot 1. (R. 192)

(Tr. 76) This is in error. In no way has the plaintiff received what it bargained for. Trans-America, and plaintiff in its subrogated position, is the successor in interest of the title conveyed by the Bethers by Warranty Deed. (R. 86-96) By virtue of the warranty deeds and assignments given in the chain of title, Trans-America, and plaintiff, in its subrogated position, has the right to maintain an action against the defendants to validate, and resolve any problems dealing with, the title to the subject property for which the defendants may be responsible. This is not disputed. (See 57-1-12, U.C.A.) Thus, if a predecessor in interest to plaintiff's insured has paid the full purchase price for the lot in question, and is therefore entitled to all warranties under the warranty deed, including title itself, a duplication of payment by a successor in interest to that original grantee provides that successor nothing to which he is not already entitled. It is well settled that ". . . to do that which one is already required to do does not constitute consideration for a new promise." Baggs v. Anderson, 528 P2d 141, at 143 (Utah, 1974). See also Van Tassell v. Lewis, 222 P2d 350 (Utah, 1950).

In this case the plaintiff has received nothing in consideration for its payment of $9,563.38 in 1984 to the defendants. Thus, contrary to what the defendants claim, the plaintiff has not received what it bargained for because it has only received what the defendants were already obligated to do, to-wit: reconvey Lot 1.

POINT III

THE PAYMENT BY PLAINTIFF TO DEFENDANTS FOR THE RECONVEYANCE WAS MADE BY MISTAKE, WHICH MISTAKE WAS MUTUAL AS TO THE PARTIES

As indicated in the facts more fully set forth above, the plaintiff made the payment for which return is now being sought, based upon the belief that the defendants had never been paid for Lot 1, which belief resulted from assurances of non-payment from both the defendants and the title company. It was not until much later that all of the facts came out, and not until some time later that enough evidence was gathered that indicated that a high probability existed that the Bethers had been paid previously for the subject property. Given the need to protect its insured from a possible foreclosure the payment of the money at the time it was paid was reasonable, partiuclarly given the assurances from the title company, and the other facts available at the time.

POINT IV

THE DEFENDANTS ARE NOT EXCUSED FROM RECONVEYING TITLE TO THE SUBJECT PROPERTY

The defendants have made two arguments which they feel affect their obligation to reconvey title. The first is that the plaintiff did not tender back title to the property in order to obtain a refund. This argument makes no sense. If the defendants have been paid for lot 1, then they are not entitled to have the title to that lot reconveyed to them as a condition to the refunding of plaintiff's money.

Their second contention, which they feel excuses them from performance, is that the time for payment of the entire balance

still due on the note had come as of the time that the check to Glenn Bethers (Ex. 14) had been received by him. But is this an excuse from performance? We submit that it is not. The check was accepted and cashed by him, he took no action to demand the balance due under the note, he took no action to foreclose the deed of trust, judicially or non-judicially, and in the end, still accepted the payment from plaintiff and reconveyed Lot 1.

It is generally held that "by the acceptance of benefits one may be estopped to question the existence, validity, and effect of a deed or mortgage." 31 C.J.S. Sec. 110(3), p. 569. Thus, in this case, it is highly inconsistent for the defendants to claim a lack of obligation to perform, while at the same time accept payment for the property, whether one takes into consideratic the payment made by plaintiff, or the payment made on the lot at the time of the sale to Norman Anderson.

CONCLUSION

The central issue rests on the principle of unjust enrichment. If the defendants have been paid twice for the same piece of property due to the mistake of the plaintiff, and the mistake of the defendants, then plaintiff should prevail. To show unjust enrichment the plaintiff has shown, without any contradictory evidence, that the thrift certificate delivered to Valley Title Company was for the purpose of obtaining a release of Lot 1. That fact alone, under the terms of the agreement, together with the course of practice, between the parties was sufficient to require the reconveyance, without any discussion of whether or not defendants eventually received the funds from

that particular thrift certificate. However, plaintiff also conclusively showed that the funds from the thrift certificate deposited with Valley Title for the purpose of obtaining the reconveyance, was also redeemed and the funds paid to defendants. The chain is unbroken from beginning to end. Thus, the defendants were paid for Lot 1 at the time of the original sale by the developer, Sunwest II. The second payment by plaintiff was nothing more than a duplication. This established, the decision of the district court should be reversed, and judgment in favor of plaintiff and against the defendants should be granted. Or, in the alternative, the decision of the district court should be reversed and the matter remanded for further proceedings, if defendants elect to present additional evidence, although it would appear that all relevant evidence and testimony has already been given.

DATED this 30th day of September, 1986.

RESPECTFULLY SUBMITTED

GREGORY B. WALL
Attorney for Plaintiff-Appellant

CERTIFICATE OF DELIVERY

This is to certify that four (4) copies of the foregoing Brief of Appellant were hand delivered to S. Rex Lewis, attorney for defendants-respondents, 120 East 300 North, Provo, Utah, on the 1st day of October, 1986.

GREGORY B. WALL
Attorney for Plaintiff-Appellant

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Our File No. 16,325

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation,	:	**ORDER OF DISMISSAL WITH PREJUDICE**
Plaintiff,	:	
vs.	:	
GLENN L. BETHERS and TELLA MAE BETHERS, husband and wife,	:	Civil No. 69,177
Defendants.	:	

The above-entitled matter came on for trial before the above-entitled Court on the 17th day of April, 1986. The plaintiff appeared by its counsel, Gregory B. Wall of Wall and Wall, and the defendants appeared by their counsel, S. Rex Lewis of Howard, Lewis & Petersen, and the defendant, Glenn L. Bethers, appeared in person. The Court having heard the evidence presented by the plaintiff, both oral and documentary, whereupon the plaintiff rested its case. The defendants, pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, moved to dismiss the Complaint on the grounds that upon the facts and the law the plaintiff had shown no right to relief. After hearing oral argument of counsel, the Court granted the defendants' Motion to Dismiss and directed the preparations of Findings of Fact and Conclusions of Law. The Court having made its Findings of Fact and Conclusions of Law herein,

IT IS HEREBY ORDERED that the Complaint of the plaintiff be and the same is hereby dismissed with prejudice.

DATED this 27th day of May, 1986.

BY THE COURT:

GEORGE E. BALLIF
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 1st day of May, 1986.

Gregory B. Wall, Esq.
Wall & Wall
Attorneys for Plaintiff
Suite 800 Boston Building
Salt Lake City, UT 84111

SECRETARY

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Our File No. 16,325

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

SOUTHERN TITLE GUARANTY CO., INC., a Texas corporation,	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Plaintiff,	:	
vs.	:	
GLENN L. BETHERS and TELLA MAE BETHERS, husband and wife,	:	Civil No. 69,177
Defendants.	:	

The above-entitled matter came on for trial before the above-entitled Court on the 17th day of April, 1986. The plaintiff appeared by its counsel, Gregory B. Wall of Wall and Wall, and the defendants appeared by their counsel, S. Rex Lewis of Howard, Lewis & Petersen, and the defendant, Glenn L. Bethers, appeared in person. The Court having heard the evidence presented by the plaintiff, both oral and documentary, whereupon the plaintiff rested its case. The defendants, pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, moved to dismiss the Complaint on the grounds that upon the facts and the law the plaintiff had shown no right to relief. After hearing oral argument of counsel, the Court granted the defendants' Motion to Dismiss and directed the preparation of Findings of Fact and Conclusions of Law. Based upon the evidence, the Court now makes the following:

FINDINGS OF FACT

1. The plaintiff is a Texas corporation and has obtained a Certificate of Authority from the State of Utah and is thus authorized and permitted to maintain this action pursuant to the provisions of §16-10-120, Utah Code Annotated 1953 as amended.

2. The plaintiff is further authorized by the State of Utah by and through its Insurance Commissioner to issue policies of title insurance and to generally engage in the business of title insurance in the State of Utah.

3. The defendants are residents of Utah County, State of Utah.

4. On June 7, 1978, the defendants, together with Welby and Ellen Bethers, entered into a written agreement with Sunwest II Development Corporation wherein it was agreed that Sunwest would purchase from Bethers land more fully set forth in the agreement, for the consideration and subject to the terms described therein.

5. On June 7, 1978, the same parties, plus T. Michael Crockett and Harold M. Paulos, individually signed a Trust Deed which included and affected the subject property.

6. Said Trust Deed was given as security for a Trust Deed Note dated June 7, 1978, with the principal amount of $82,950.00 being all due and payable, together with interest, on the 1st day of July, 1981.

7. As a part of the agreement between the parties, the defendants herein as holders agreed to reconvey title to one lot in the subdivision to be developed by Sunwest for each $6,912.50 principal reduction paid towards the note.

8. Subsequent thereto, Lot 1 was sold by Sunwest II to Norman Anderson. Lot 1 was subsequently purchased by Tony Max Martin and Dale Martin, husband and wife, and plaintiff issued its mortgagee policy of insurance to Trans-America Mortgage Company insuring said Trans-America as having a first deed of trust on Lot 1 and without mentioning the Deed of Trust of the defendants, which Deed of Trust was of record and prior of record to the deed of trust to Trans-America and was superior to the interest of the Martins.

9. Trans-America Mortgage was charged with notice that no reconveyance of Lot 1 had ever been effected.

10. On or about October 26, 1984, defendants received from plaintiff a check in the amount of $9,582.60.

11. Said check was paid to the defendants by the plaintiff to obtain a request for reconveyance and the reconveyance of Lot 1 of the subject subdivision.

12. The plaintiff at all times knew that the defendants would not request a reconveyance of Lot 1 unless they were paid the sum of $9,582.60.

13. The plaintiff, prior to making the payment on October 26, 1984, to the defendants, had received a letter from Valley Title Company addressed to Gregory B. Wall dated October 10, 1984.

14. The plaintiff has not tendered to the defendants a reinstatement of the Deed of Trust on Lot 1 as security for the obligation of Sunwest II to the defendants.

15. Plaintiff's claim is one based upon being subrogated to the rights of Trans-America Mortgage Company pursuant to the terms of its insurance policy.

16. The check from FMA Thrift & Loan, No. 29031 dated August 7, 1981, in the amount of $9,563.38 was not for the release of Lot 1 from the Deed of Trust as far as the defendants are concerned.

17. The defendants have not been paid twice for the release of the subject lot.

18. The principal balance that was due to the defendants from Sunwest II on October 25, 1984, was the sum of $13,253.87, together with interest from August 14, 1981.

19. The real property that secured the balance as set forth in the proceeding paragraph was Lot 1 and Lot 2, Plat "A", Meadow Creek Estates Subdivision, Provo, Utah.

20. Sunwest II would not have been entitled to a reconveyance of Lot 1 on October 25, 1984, without paying to the defendants at least the sum of $9,563.38.

21. The plaintiff received what it bargained for when it paid the sum of $9,563.38 to defendants and received therefore a reconveyance of Lot 1.

22. The plaintiff obtained the reconveyance of Lot 1 by payment of $9,563.38 to defendants knowing that it could not obtain a reconveyance voluntarily otherwise and without filing a legal action to attempt to compel a reconveyance.

23. Trans-America Mortgage Company would not have had a right to compel the defendants to reconvey Lot 1 without paying money to the defendants for a reconveyance.

24. The defendants have not been unjustly enriched at the expense of the plaintiff.

25. The plaintiff is not entitled to recover the funds it has paid to the defendants under its policy of insurance with Trans-America Mortgage Company.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The Complaint of the plaintiff should be dismissed with prejudice and the defendants awarded their costs herein.

DATED this 27th day of May, 1986.

BY THE COURT:

GEORGE E. BALLIF
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 1st day of May, 1986.

Gregory B. Wall, Esq.
Wall & Wall
Attorneys for Plaintiff
Suite 800 Boston Building
Salt Lake City, UT 84111

SECRETARY